

**SUPERSEDED
IN PART****M e m o r a n d u m**

To : MEMO TO FILE

Date : *By: 90-654*
November 29, 1990From : FAIR POLITICAL PRACTICES COMMISSION
John W. Wallace

Subject : BURNHAM NO. A-84-062

The Strauss Advice Letter (No. I-90-654) has modified the conclusion in this letter. The Strauss letter concludes that a membership interest with a fair market value of \$1,000 or more in a country club which is a business entity is an "investment" in the business entity if it can be resold at a profit or a loss. To the extent that this letter conflicts with this conclusion, it is disapproved.

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Fair Political Practices Commission

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June 14, 1984

Robert H. Burnham
City Attorney
City of Newport Beach
3300 Newport Boulevard
Newport Beach, CA 92663

Re: Your Request for Advice
Our File No. A-84-062

Dear Mr. Burnham:

This letter is sent in response to your request for advice on behalf of Newport Beach City Councilmembers John Cox, Jackie Heather, Ruthelyn Plummer, Donald A. Strauss, Bill Agee, and Philip Maurer concerning the conflict of interest provisions of the Political Reform Act.^{1/} The following advice is provided pursuant to Section 83114(b).

SUMMARY OF THE ISSUES

The Balboa Bay Club ("Club") is a private social club owned and operated by International Bay Clubs, Inc. The principal shareholder in the Club is W. D. Ray. It is located on land owned by the City of Newport Beach ("City") for which the Club has a long-term lease. Two City councilmembers have memberships in the Club, and four have received guest passes from the Club. The questions raised concern the disclosure and disqualification requirements for these councilmembers.^{2/}

^{1/} Government Code Sections 81000-91014. All statutory references are to the Government Code unless otherwise noted.

² I understand that the City Manager has also received a guest pass from the Club so the following discussion is also applicable to his situation.

SUMMARY OF THE CONCLUSIONS

The councilmembers who have memberships in the Club need not disclose the memberships on their annual Statements of Economic Interests. The councilmembers who have received guest passes from the Club must disclose the passes as gifts on their Statements. Since the value of the passes clearly exceeds \$250, disqualification on matters affecting the Club is required for all councilmembers who have received passes. The councilmember with the company membership need not disqualify himself on matters affecting the Club; however, the councilmember with the lifetime membership must not participate in any decisions which could foreseeably have a substantial effect on the value of his membership.

FACTS

1. Relationship between Club and City

In 1948, the City leased a 27-acre parcel of City-owned tidelands and uplands to the Club for a period of 50 years.^{3/} Since the Club took possession of the land, it has been improved with a marina, a large apartment complex, conference and meeting rooms, restaurant, bar, retail shops, spa and other recreational facilities. Certain retail facilities are open to the public upon request. Numerous functions and meetings are held at the Club; the Club has a group sales division which solicits (members and nonmembers) for banquet and lodging business. In addition, the Club hosts certain community and charitable functions including the Boy Scout Boat Auction and the Chamber of Commerce Superstar fundraiser.

Under the terms of the lease, the Club is required to obtain the City's consent for any subleases for a term in excess of one year and for any assignments of the lease. The latter has been interpreted to require City consent for the use of the leasehold interest as security for refinancing indebtedness incurred by the construction of improvements. The City Council has made numerous decisions on subleases and assignments since the lease was entered into.

The lease further provides that the land and improvements will revert to the City upon termination. The lease

^{3/} You provided a copy of the lease as amended to 9/75 to me in connection with this advice request.

specifically states that the relationship between the City and the Club is that of a landlord and tenant and not that of a partnership or joint venture.

The Club has recently requested an extension of approximately 11 years to the lease and proposes to increase the rent in consideration for the extension. Other unspecified revisions and modifications proposed by the Club are also currently under review. The Council has appointed an Ad Hoc Committee to meet with representatives of the Club and review the current lease as well as the revisions and modifications proposed by the Club. This Committee is then to report to the Council for Council action on the proposed lease extension.

2. Relationship between Councilmembers and Club

As noted above, two councilmembers have memberships in the Club and four councilmembers have received guest passes from the Club. The Club has a long-standing practice, which began before the current owner purchased the Club, of providing guest passes to City councilmembers.

a. Memberships

Councilmember Jackie Heather holds a Lifetime Silver Membership in the Club. Mr. Heather purchased this membership for \$6,000. With this membership, Mr. Heather does not pay monthly dues, and he, his spouse and any dependent children are entitled to use all of the Club facilities. The membership is continuously and freely transferable, and it has a current market value of approximately \$11,000.

Councilmember John Cox has a Company Membership in the Club. The initiation fee for this type of membership was \$1,800 at the time it was purchased. Each member must be a bona fide employee of the company. The member must pay monthly dues of \$80. The spouse and unmarried, dependent children under age 25 of the employee/member have full Club privileges. The membership may only be transferred within the company. If the member leaves his company, he will be credited for the amount paid for his initiation fee toward a regular transferable membership (whether he or the company paid for the membership) should he wish to remain as a member.

b. Guest Passes

Councilmembers Ruthelyn Plummer, Donald A. Strauss, Bill Agee and Philip Maurer have received complimentary guest passes from the Club; the spouses of at least two of the councilmembers have also received passes. This type of pass entitles the holder to the use of all Club facilities with the exception of the spa. Normally a guest pass is issued for a short definite period (less than one week), but the passes issued to the councilmembers cover a calendar year. At the end of each year, the passes are reviewed by the President of the Club and, if he so chooses, are re-issued for the next calendar year. The passes are revocable at the will of the Club at any time and may not be transferred. The pass may be used to charge food and drink to the holder's account for later billing.

In a letter from Thomas G. Deemer, President of the Club, to you, dated April 17, 1984, regarding this advice letter, he stated as follows:

Complimentary guest passes are typically issued for a short term. Recipients do not receive the Club magazine and are not generally exposed to numerous Club social and athletic functions, and would be excluded from those programs which are an integral part of the Club. These activities provide a continuing incentive for becoming a Club member. For example, the Club sponsors numerous recreationally oriented athletic programs for all age groups including volleyball, swimming, tennis, gymnastics, sailing and many others, including the summer day camp "Spartans" program for children ages 6-13. Social programs include numerous Club parties, bridge, bingo, clubs, events at the theatre, days at the races, design classes, ski functions and other activities described in the enclosed magazine. Social guests or holders of complimentary passes are generally not exposed to this aspect of the Club.

It should be noted that in the case of the complimentary gate passes in question, several points of distinction may exist, as follows:

The practice of issuing such passes commenced some time prior to December, 1974, when the transfer of ownership to the present owner occurred. In

connection with the Club purchase, an agreement was made to continue pre-existing complimentary memberships for at least a reasonable period.

At the time the Newport Beach (NB) memberships came to the current owners attention, it was explained to him that a long standing agreement with the City was in existence to permit ready access to City Officials because of the landlord-tenant relationship, as well as the frequency of visitations by City Officials to numerous civic and charitable functions held at the Club. This practice has therefore existed for at least 12 years.

In 1981, at the request of the City Attorney, the Club expressed its written opinion (see letter attached) that the NB passes had only nominal, if any value. The Club still feels that opinion is valid as the passes are not transferable. The current method of issuing NB passes is a matter of considerable convenience to the Club, as the lack of a pass creates an identification stop at the front gate and can cause traffic congestion on the Pacific Coast Highway. Similarly, any charges by a passholder is more conveniently and economically billed to that individual as the Club does not handle cash and must pay a fee to process other charge cards.

Complimentary passes are issued upon the approval of the President and Chairman of the Board of the Club, and fall into some general categories, namely:

1. Established members of the press or media, and,
2. Distinguished athletes inducted into the BBC Athletic Hall of Fame. In the case of an existing member, a membership may be converted to "Honorary" at no charge, non-members inducted are afforded the same status.
3. Individuals who may have made a long term distinguished contribution to the Club, the Community or both.
4. Selected individuals from the Academic Fraternity and the Public Service Area.

The above complimentary passes comprise 3.8% of the total Club memberships. City passes account for .016% of the memberships.

ANALYSIS

1. Disclosure

City councilmembers file an annual Statement of Economic Interests (Form 721) disclosing their investments, interests in real property, and income. Sections 87200, et seq. Income includes all gifts received during the year from a single source totalling \$50 or more in value. Section 87207.4/ The four councilmembers who receive complimentary guest passes must disclose the receipt of those passes as gifts on their Statements, and they have been so disclosing. The valuation of the passes will be discussed in detail during the discussion of the disqualification requirements.

The two councilmembers who hold memberships in the Club need not disclose their memberships on their Statements of Economic Interests. The memberships are a form of personal property, and items of personal property are not required to be reported unless they are sold or income is otherwise derived from them.

2. Disqualification

As you know, Section 87100 prohibits a public official from making, participating in the making, or attempting to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest. An official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on any source of income aggregating \$250 or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made. Section 87103(c).

In your letter requesting advice, you stated that for the purposes of our analysis, we should assume that the effects of the Council decisions on the lease with the Club will have a

^{4/} Section 82028 defines "gift" to include "any payment to the extent that consideration of equal or greater value is not received...."

foreseeable, material financial effect on the Club. Based upon our understanding of the situation, we think this is a reasonable assumption to make. Accordingly, the issues which remain are as follows:

a. Whether the value of the complimentary guest passes exceeds the \$250 disqualification threshold.

b. Whether the councilmembers who hold memberships in the Club are subject to any disqualification requirements.

You also asked us to consider the ramifications of an opinion that the guest passes do require disqualification and our thoughts on some alternatives to the present situation.

Valuation of Guest Passes. Since the guest passes are issued annually for a calendar year, the value assigned to the pass should be computed based on the free use of the Club facilities for a 12-month period. Although pass holders do not have all of the privileges of Regular Members, their use and enjoyment of the facilities appears comparable. Regular Members pay an initiation fee of \$4,000 and monthly dues of \$80.^{5/} It seems reasonable to use the monthly dues figure of \$80 per month to compute the value of a guest pass, i.e., over a calendar year, the value of the pass would be \$960. Even if this figure were discounted in any way, it seems clear that the pass is worth well over \$250. Accordingly, the councilmembers who have received guest passes from the Club must refrain from making or participating in decisions regarding the Club lease during the 12 months following the receipt of such a pass.

Memberships. Since there are important differences between Company Memberships and Life Memberships, I will discuss them separately.

Life Membership. A member of the Club does not have any voting or other ownership rights in the Club. Therefore, as discussed above, this type of Club membership is neither an investment in a business entity nor any type of interest in real property; rather it is a form of personal property. However, Section 87103(c), an effect on a source of income, has been interpreted to include a direct financial effect on the official, i.e., where the decision will confer a financial

^{5/} A Regular Membership is only salable one time with a transfer fee to the Club, but it is continuously transferable within the immediate family without fee.

benefit or detriment upon the official or a member of the official's immediate family, in an amount of \$100 or more. Commission regulation, 2 Cal. Adm. Code Section 18702(b)(3)(A). Accordingly, if the Council were faced with a decision on the Lease that would mean a closing down of the Club's operations, e.g., a decision to terminate the lease, then there would be an immediate impact on the value of Mr. Heather's membership, and he should disqualify himself. Conversely, on the pending decision to extend the lease for 11 years could increase the value of his membership, and he should disqualify himself from participating in this decision. On most of the other decisions involving the lease, such as decisions to approve subleases or assignments, where there would be no immediate impact on the value of his membership, he would not have to disqualify himself.

Company Membership. Unlike Mr. Heather and his Lifetime Membership, Mr. Cox does not own an item which he can transfer for value. If he leaves the company for which he works, he no longer has a membership. Although the membership may be important to him in other ways, in Political Reform Act conflict of interest analysis, we focus on the financial impact on an official as a result of governmental decisions. If the City decided to terminate or extend the lease with the Club, Mr. Cox would not receive a financial detriment or benefit. Accordingly, Mr. Cox is free to participate in all decisions affecting the Club.

3. Legally Required Participation

Based on the above analysis, the four councilmembers who have received guest passes will be disqualified from participating in any decisions on the Club lease until 12 months have lapsed since they received the passes. Section 87103(c). Thus, if they do not accept passes for 1985, they will be able to participate in those decisions as soon as 12 months have elapsed from the date when they received their 1984 passes. In the meantime, that leaves only two councilmembers with no conflicts and one councilmember with a conflict on only a few decisions. The Act provides that a public official who has a conflict of interest in a decision may still participate in that decision "to the extent his participation is legally required for the action or decision to be made." Section 87101; see also 2 Cal. Adm. Code Section 18701 (copy enclosed). The Commission has interpreted this section to mean that if a quorum cannot be convened of members who are not disqualified, a council or other governmental body can use any reasonable and equitable means of selection to bring back enough members to achieve a quorum,

including a random means of selection. Hudson Opinion, 4 FPPC Opinions (No. 77-007, Feb. 7, 1978) (copy enclosed). In this matter, assuming it is a decision in which Mr. Heather can participate, one of the disqualified members could be chosen by lot to participate in the decision.

4. Alternatives to Guest Passes

In your request for advice, you posed the following:

The Bay Club has expressed an intention to return to its previous practice of issuing a single complimentary guest pass to be held by the City Manager. A courtesy "gate pass" would be issued to the individual members to allow them to gain access to the Bay Club premises in the event a councilmember wanted to inspect the Bay Club facilities. The single City membership would be utilized should a councilmember wish to use the restaurant or other facilities in conjunction with City business.

You asked whether our opinion concerning disqualification would be different if this were the situation. If a guest pass is available to the councilmembers for their unlimited use, but they do not have it in their actual possession, the issue is whether they have received a gift which would trigger disqualification. The fact that the pass is available does not by itself mean that any of the councilmembers have received a gift. However, once the pass is used by a councilmember for personal purposes, he or she will have accepted a gift equal in value to the pass as discussed above.^{6/} For purposes of disclosure and disqualification, the date the pass was made available to the councilmembers will be considered the date of the receipt of the gift and not the date that the pass was first

^{6/} If the guest pass is to be used only in connection with City business, the requirements of the Commission's Stone Opinion must be met for the pass to be considered a gift to the City and not to the official. 3 FPPC Opinions 52, 57 (No. 77-033, June 9, 1977) (copy enclosed). We would assume that if the City pays the Club bill, that the pass is being used in connection with City business, and conversely, if the official personally, pays the bill, that the pass is being used for personal purposes.

Robert H. Burnham
June 14, 1984
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used since the use of the pass is evidence of intent to accept a gift at the time of the offer.^{7/}

As I understand it, both under California law and the lease between the City and the Club, the City as lessor has a "right of entry" to inspect and observe the premises. The idea of the proposed gate pass is to allow convenient access to councilmembers pursuant to this right of entry. The gate pass would also allow holder to gain entry for purposes of attending a function in Club facilities, but it would not allow the holder to charge either on a personal Club account or on a credit card account any food or drink consumed on the premises. The Club does not accept cash or personal checks, so this is a severe limitation on the use and enjoyment of the facilities. Nonmembers who attend functions at the Club must normally check in at the entry gate, and their name is checked against a list of attendees. The only advantage then to having a gate pass is quick and easy entry.^{8/} If there are no other perquisites involved in having a gate pass and the gate pass holder has no privileges beyond what another nonmember would have when he or she attended an event or meeting at the Club, the possession of a gate pass alone would not constitute a gift from the Club and would therefore not require any disclosure or disqualification.

I trust that this discussion answers all of your concerns. If I can be of further assistance or you would like to discuss this information, please feel free to contact me.

Sincerely,



Diane Maura Fishburn
Staff Counsel
Legal Division

DMF:plh
Enclosures

^{7/} In a recent letter to the Clerk of the San Francisco Board of Supervisors, we gave advice regarding a similar situation. Advice Letter No. A-84-094 (copy enclosed).

^{8/} It was explained to me that the entry to the Club is on the Pacific Coast Highway and that there have been problems with traffic back-up of persons waiting to check in.



CITY OF NEWPORT BEACH

MAR 22 3 24 AM '84

OFFICE OF THE CITY ATTORNEY
714/640-1101

March 19, 1984

Ms. Barbara Milman
Chief Legal Counsel
Fair Political Practice Commission
PO Box 807
Sacramento, Ca. 95804

Re: Request for Written Advice

Dear Ms. Milman:

The City of Newport Beach is requesting advice as to whether members of the City Council would be disqualified from voting on matters affecting a lessee of City-owned property. The lessee is the Balboa Bay Club, a private social and recreational club located at 1221 West Coast Highway in Newport Beach.

Relationship Between City and Balboa Bay Club

In 1948, the City of Newport Beach leased a 27-acre parcel of City-owned tidelands and uplands to the Balboa Bay Club for a period of 50 years. Since entering into the lease, the property has been improved with a marina, large apartment complex, conference and meeting rooms, restaurant, bar, retail shops, spa and recreational facilities.

Under the terms of the lease, the Balboa Bay Club is required to obtain the City's written consent for any subletting of the Club's facilities for a term in excess of one year. The City Council has, on numerous occasions in the past, given its consent to subleases between the Bay Club and the owners of small shops within the Club.

The lease also prohibits the Club from assigning the Lease, or any interest therein, without the written consent of the City Council. This provision has been construed by the parties as requiring City Council action to consent to use of the leasehold interest as security for refinancing the indebtedness incurred as a result of the construction of the improvements described above. The City Council has, on a number of occasions, given its

consent to the use of the leasehold interest for refinancing purposes conditioned such that the City's interest in either the lease or the property would not be impaired.

The lease further provides that the land and improvements will revert to the City upon termination. The lease specifically states that the relationship between the City and the Balboa Bay Club is that of a landlord and tenant and not that of a partnership or joint venture.

Relationship Between Councilmembers and Balboa Bay Club

Two members of the current City Council hold formal memberships in the Balboa Bay Club. Additionally, some members of the current City Council have been issued "Complimentary Guest Passes."

Nature of Memberships

The nature of the formal memberships, and the passes, can be summarized as follows:

1. One councilmember has a "Lifetime Silver" membership. This membership was purchased for \$6,000.00 and has a current market value of approximately \$11,000.00. The membership is continuously transferable. The councilmember is entitled to free use of all facilities and there are no monthly dues. The member must pay full value for all food and drink consumed on the premises;
2. One councilmember has a "Corporate" membership. The initiation fee for this membership was \$1,800.00. There is no known market value for such a membership because it can be transferred only within the corporation. Initiation fees for this type of membership are currently \$3,000.00. The member is required to pay monthly dues to allow use of the facilities. Monthly dues are \$70.00 without use of the tennis facilities, and \$85.00 if the member wishes full use of the tennis courts. Corporate members are required to pay for all food and drink consumed on premises;

3. The Complimentary Guest Passes entitle the councilmember to use of all facilities with the exception of the spa. The guest passes are reviewed annually by the president of the Bay Club, and are revokable at will. The Councilmembers holding Guest Passes are obligated to pay full price for all food and drink consumed on the premises. The issuance of the Complimentary Passes derived from a previous practice of issuing a single Guest Pass, held by the City Manager for use by members of the City Council in inspecting the property or attending official City functions. This practice apparently became somewhat cumbersome and difficult to administer with the result that Complimentary Passes were issued directly to councilmembers.

Nature of Bay Club Request

The Balboa Bay Club has recently requested the City consider granting an extension to the term of the existing lease. The proposed extension would cause the lease to terminate approximately 11 years after the current date of termination. The Bay Club is also proposing to increase the rentals paid to the City, in consideration for the lease extension.

The City Council has appointed an Ad Hoc Committee to meet with representatives of the Balboa Bay Club and review the current lease as well as the revisions and modifications proposed by the Bay Club. This Committee is then to report to the City Council for Council action on the proposed lease extension.

The Bay Club has expressed an intention to return to its previous practice of issuing a single Complimentary Guest Pass to be held by the City Manager. A courtesy "Gate Pass" would be issued to the individual members to allow them to gain access to the Bay Club premises in the event a councilmembers wanted to inspect the Bay Club facilities. The single City membership would be utilized should a councilmember wish to use the restaurant or other facilities in conjunction with City business.

For the purposes of your opinion, we think it appropriate if you assume it is reasonably foreseeable that approval of the requested lease extension could have a material financial impact on the Balboa Bay Club.

Request for Written Advice

The City requests your advice on the following:

1. Do any of the current members of the council have a "financial interest" in the Balboa Bay Club such that they are disqualified from participating in a decision to extend the terms of the existing lease?
2. Assuming that you conclude that the Complimentary Guest Passes would require disqualification, would your opinion be different if the Complimentary Guest Passes were revoked, and each councilmember issued a "Gate Pass" as outlined above.
3. For what period of time would Councilmembers be precluded from voting on the proposed lease extension assuming either sale of formal memberships or return/revocation of complimentary passes?
4. Assuming some, but not all, Councilmembers are disqualified, may the Council invoke the rule of necessity in order to reach a quorum sufficient to take action on a proposed lease extension?

Thank you for your attention in the above matter.

Very truly yours,



Robert H. Burnham
City Attorney

RHB/pr

State of California



Fair Political Practices Commission

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September 21, 1984

Robert H. Burnham
City Attorney
City of Newport Beach
3300 Newport Boulevard
Newport Beach, CA 92663

Re: Your Follow-Up Letter dated
July 25, 1984
Our File No. A-84-062

Dear Mr. Burnham:

I am in receipt of your letter dated July 25, 1984, requesting a clarification of my advice to you and Mr. O'Neil's letter dated August 7, 1984, on behalf of the Balboa Bay Club ("Club") providing me with additional information. In addition, I spoke in a conference call with you, Mr. Dennis O'Neil and Mr. Thomas Deemer, the President of the Club. Your questions can be summarized as follows:

1. Whether the additional information concerning "Business" memberships and "Honorary" memberships provided by the Club changes our opinion on the valuation of the Guest Passes held by the councilmembers.

2. Whether the exception to disqualification for "legally required participation" is applicable in this situation, and, if it is, the details of its application.

3. Whether your proposed alternative to the Guest Pass would allow the councilmembers to participate in decisions concerning the Club.

DISCUSSION

1. Valuation. In my letter of June 14, 1984 (No. A-84-062), I compared the Guest Passes received by the councilmembers to a Regular Club Membership since the privileges seemed comparable. I then used the monthly dues fee for a

Robert H. Burnham
September 21, 1984
Page 2

Regular membership to compute the value of a Guest Pass. I concluded that the value of a calendar year Pass would be \$960.

From the new information which I received after I wrote my letter, it appears that the term Guest Pass was a misnomer; what the councilmembers have been given are really Honorary or Guest memberships. Honorary memberships are nontransferable, revocable at will by the Club, and require the holder to personally pay for all goods and services offered by the Club. The Club gives these memberships to several categories of persons including political officeholders, members of the press, athletic and entertainment dignitaries and officials in the academic community. There is no initiation fee for an Honorary membership nor are there any monthly dues. At this time, there are 176 outstanding Honorary memberships. It is my understanding that Honorary memberships include family privileges (i.e., use of membership privileges by members of the holder's immediate family).

In the new information provided to me, there was discussion of a type of Club membership not previously described. These are "Business" memberships. These memberships can be purchased for \$500, and there is a \$15 per month dues requirement. According to Mr. O'Neil's letter, "[t]he Business membership is nontransferable, excludes family member privileges, and does not offer the member the range of social and use privileges which a regular or corporate members has." There have been approximately 50 Business memberships issued by the Club over the last 12 years.

It is my understanding that the Club takes the position that the Honorary memberships have little, if any, value, and, in any event, are more akin to Business memberships rather than Regular memberships. In addition, the Club has offered facts indicating that the councilmembers holding the Honorary memberships on the average have used their Club privileges infrequently and that the councilmembers have primarily used their memberships to attend Chamber of Commerce functions and other civic affairs held at the Club.

Despite this new information, it is our opinion that the value of the Honorary or Guest memberships provided free to the councilmembers exceeds \$250, and the advice contained in my letter dated June 14, 1984, remains unchanged.

The frequency of use of a free pass or gift is not a factor in calculating the value of the pass or gift. Hopkins Opinion, 3 FPFC Opinions 107 (No. 77-022, December 8, 1977) (copy enclosed). In the Hopkins Opinion, the Commission held that the

fair market value of free passes to sporting events and amusement parks which cannot be purchased on the open market should be based on the maximum reasonable use of the pass and not on the actual use by the official. The Commission stated as follows:

When determining the value of a gift it is important to remember that the Act requires the reporting of fair market value even if an official derives little or no benefit from the gift. For example, a bottle of fine wine may be unappreciated by a recipient who does not drink alcoholic beverages. Nevertheless, the reportable value of the wine is its fair market value, without regard to the utilization of the gift by its recipient. Similarly, a complimentary ticket or free pass has a market value that is independent of the frequency with which the official attends the event in question. (Footnote omitted.)

3 FPFC Opinions at 112.

The Commission added that if an official believes that reporting a gift based on this valuation method may mislead the public because he has never or only rarely used the gift, he may, of course, include an explanation on his financial disclosure form.^{1/}

In addition, it appears to us that the Honorary or Guest membership, while unique in some of its features, still more closely resembles a Regular membership rather than a Business membership partly because the Honorary membership includes family privileges. In any event, even if the value of an Honorary membership were based on the value of a Business membership, the initiation fee of \$500 would have to be calculated into the value.^{2/} Thus, the value of the Honorary membership would still exceed \$250.

^{1/} The Commission gave the following as an example: "Season pass to Disneyland; difficult to value; but value estimated at \$620; never used."

^{2/} We excluded the initiation fee of the Regular membership in our valuation of the Honorary membership because we deemed it to cover the value of the transferability of the membership. However, it is equally reasonable to assume that at least part of the initiation fee was a part of the value of a Honorary membership.

2. Legally Required Participation. Since several councilmembers are disqualified from participating in many of the decisions concerning the Club, you asked whether the exception for "legally required participation" in Government Code Section 87101 would apply to allow some or all of them to participate. The City Charter requires four affirmative votes to enact any ordinance or resolution, and thus on the issue of the resolution on the Club lease, there is also a question of how many disqualified councilmembers should be allowed to participate.

Since it has been made clear to me that the City Council does not intend to take any action on the Club lease until early next year, at which time the 12-month period for disqualification will have expired, we decline to address this question. It raises several difficult issue which can only be dealt with in a concrete situation. In the meantime, I would point out the Commission's suggestion in the Hopkins Opinion, supra, that the rule of legally required participation does not apply to the situation where a conflict arises because of gifts an official accepted when it was reasonably foreseeable at the time the gift was received that the official would be asked to make or participate in the making of a governmental decision affecting the donor.

3. Alternatives to Honorary Memberships. In your letter dated July 25, 1984, you proposed an alternative to the Honorary Membership and asked whether the value of such a "Guest Card" would exceed the \$250 threshold for disqualification. It appears from the conditions you listed that the Guest Card would only entitle the holder to admittance to the Club. Assuming that there are no other privileges (including family member privileges) attached to the card, it seems to meet the criteria I set forth in my letter of June 14, 1984. The card would serve merely as a convenience for entering the Club premises. If this is the case, the value of the card would not exceed \$250.

I trust that this letter answers all of your concerns. Please feel free to contact me if I can be of further assistance.

Sincerely,



Diane Maura Fishburn
Staff Counsel
Legal Division



CITY OF NEWPORT BEACH

OFFICE OF THE CITY ATTORNEY
(714) 640-2201

JUL 31 1984

July 25, 1984

Ms. Diane M. Fishburn
Staff Counsel
Fair Political Practices Commission
PO Box 807
110 K St., Building
Sacramento, Ca. 95814

Re: File No. A-84-062

Dear Ms. Fishburn:

Thank you for your response to our request for advice on behalf of members of the Newport Beach City Council with respect to their participation in the consideration of a proposed extension/modification of the Balboa Bay Club Lease.

I have reviewed your opinion and, before advising the Council on this issue, I would appreciate clarification on the following:

1. Valuation

(a) Other Memberships:

Prior to receiving a your opinion, the Bay Club advised me that they offer memberships not described in the material sent to you. One of these memberships is offered to businessmen. The "Business" membership initiation fee is \$500 and dues are \$15 per month. This membership entitles a holder to full use of the facilities (must pay extra for spa) and, unlike the "Guest Pass," is not subject to termination at the will of the Club.

The Club also carries approximately 180 "Honorary" members. "Honorary" memberships are given to members of the local press, sports figures, academicians and political figures. Like the "Guest Passes" these memberships are issued for convenience, i.e., ,to allow easy access to the Club, and are characterized by infrequent use.

By copy of this letter, we are asking the Club to provide you with additional information relative to "Business" and "Honorary" memberships, and the extent to which they differ from the memberships you have evaluated.

(b) Basis for Valuation

Your valuation of the "Guest Passes" is based primarily on the dues paid by a person holding a "Corporate" membership. In my opinion, "Corporate" membership dues are not an accurate gauge of the value of the "Guest Pass." The reasons for my opinion are as follows: (1) The value of a "Corporate" membership can be traced, only in small part, to the Club's recreational facilities. There are many athletic clubs in and around Newport Beach that charge \$20 - \$30 per month for memberships and have far superior facilities (2) The value of a "Corporate" membership seems to be based on two related factors. First, the membership is valuable as a business asset. "Corporate" members frequently entertain business clients at the Club. Second, there is also some value inherent in a membership in a private club. The "Guest Passes" do not convey upon the holder any special status or business advantage.

2. Participation Of Disqualified Members.

As I explained in our recent telephone conversation, it is unclear to me whether the rule of necessity can be applied to allow otherwise disqualified members to participate in a decision on any proposed extension of the Bay Club lease. It is my understanding the the FPPC is also unsure whether the rule of necessity is applicable where disqualification is based upon the receipt of a gift with a value of \$250.00 or more. The Charter of the City of Newport Beach provides that the affirmative votes of at least four members of the City Council are required for the enactment of any ordinance or resolution. Any vote approving a lease extension would, in all probability, be memorialized in a resolution. For this reason, I need to know if the disqualified members are allowed to participate and vote, not whether they may be selected for the purpose of establishing a quorum.

It is my understanding that you intended to discuss the unique facts of our case with other staff members and then provide us with clarification on the issue.

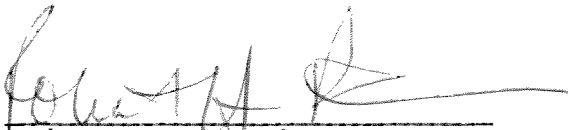
3. Alternatives to "Gate Passes" or "Guest Card"

I have enclosed a "Guest Card" currently issued by the Bay Club. Assuming the "Guest Card" is modified as discussed below, please advise if receipt of the card would result in disqualification. Modifications to the card can be summarized as follows:

1. The card would specify that the holder is entitled only to admittance to the Club; and
2. The card would state that possession does not confer any right or privilege, aside from admittance, that is granted to members, or associated with membership; and
3. The card would state that possession does not entitle the holder to use any recreational facilities, or participate in any program or service offered by the Club; and
4. The card would not authorize the holder to charge food or drink.

We appreciate the time you have spent on this matter, and look forward to your response to our request for clarification.

Sincerely,


Robert H. Burnham
City Attorney

RHB/dt

MMP/FPFC2